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Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TALASILA, INC., AND

M. R. MIKKILINENI,

Petitioners,

v.

ALEXIS HERMAN, SECRETARY OF LABOR[1],

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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76 pp

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QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals deny Petitioner's right to procedural due process of law to intervene and appeal the OSHRC decision to impose a $153,000 fine when it granted Respondent's Motion to Dismiss the appeal because a wrong party was named as the petitioner in the caption by the Fifth Circuit?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Question Presented	*i*
List of Parties	*ii*
Table of Contents	*iii*
Table of Citations	*iv*
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6

I. The Court of Appeals denied an uncounseled litigant its right to due process of law when the court dismissed the appeal because of a question of standing to intervene and a wrong party was named in the caption as the petitioner

Conclusion	10
Appendix	11

TABLE OF CITATIONS

	Page
Cases Cited:	
In Re Pittsburgh & L.E.R. Co., Etc., 543 F.2d 1058 (3d Cir. 1976)	9
Izumi Seimitsu v. US Philips Corp., 510 U.S. 27, 114 S. Ct. 425 (1993)	9
Lawrence v. Chater, ___ U.S. ___, 116 S. Ct. 604 (1996)	10
National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S. Ct. 2778 (1976)	8
NLRB v. Local 476, Plumbing and Pipefitting, 368 U.S. 401, 82 S. Ct. 423 (1962)	9
Provident Tradesmen B. & T. Co. v. Patterson, 390 U.S. 102, 88 S. Ct. 733 (1968)	9
Constitutional Provision Cited:	
Fifth Amendment to the United States Constitution	2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Talasila, Inc., and M.R. Mikkilineni respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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[1] The original Petition for Review to the Fifth Circuit Court of Appeals named Robert Reich, then Secretary of Labor. When Mr. Reich resigned, the subsequent filings with that Court named Cynthia A. Metzler, Acting Secretary of Labor. On May 1, 1997, Alexis Herman became the Secretary of Labor. She is the proper party in this petition.

OPINIONS BELOW

There were no opinions issued below. Rather, the Fifth Circuit Court of Appeals issued an Order which is reproduced in the Appendix filed herewith ("App.") at 1a. The Occupational Safety and Health Review Commission's Order in this case is reproduced at App. 5a(3).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Due Process Clause of the Fifth Amendment to the United States Constitution which states, in pertinent part:

> No person shall be . . . deprived of life.
> liberty or property without due process of law.

STATEMENT OF THE CASE

On June 17, 1992, the City of Houston entered into a written contract ("The Contract") with Talasila, a partnership registered in Harris County, Texas for the construction of a sewer pump station. M.R. Mikkilineni, a Registered Professional Engineer, and General Partner of Talasila, was responsible for all activities involving construction work of The Contract which began in November 1992 and was successfully completed in July 1993.

In May 1992, Mr. Mikkilineni also incorporated "Talasila, Inc.", a corporation under the laws of the State of Texas. Talasila, Inc. was not a party to The Contract.

In February, March, May and June 1993, inspectors from the U.S. Occupational Safety and Health Administration (OSHA) appeared unannounced and conducted safety inspections of Talasila's facilities without Mr. Mikkilineni's consent. The inspectors issued citations which carried penalties in excess of $150,000. The citations were issued in the name of Talasila, Inc. which the inspectors knew was not a party to The Contract.

The inspections were made as a result of complaints which were registered by representatives of the City of Houston. The City representatives and the OSHA inspectors were not knowledgeable about trench safety designs which Mr. Mikkilineni was permitted to develop under the Occupational Safety and Health Act. The construction was successfully completed without any safety incident. Despite this proven track record, OSHA pursued the citations against Talasila Inc. which vigorously contested the validity of the citations.

The Secretary of Labor ("the Secretary") filed citations against Talasila, Inc. with the Occupational Safety and Health Review Commission ("The Commission") but not in the name of Talasila (the partnership and the party to The Contract). In preparation for the hearing on the contested citations, Mr. Mikkilineni made discovery requests which the Secretary refused to honor and which refusal was affirmed by the administrative law judge (ALJ) which the Commission assigned to hear the case. A hearing was held before the ALJ in October 1994 at which Mr. Mikkilineni represented Talasila, Inc. On the third day of the hearing the ALJ removed Mr. Mikkilineni from the proceedings and took testimony from the Secretary, but did not enter any factual findings.

Talasila, Inc. appealed the ALJ's actions to the Commission which remanded the case in February 1996 to another ALJ for rehearing. In March 1996 the ALJ granted the Secretary's motion to correct the name of the caption to substitute "Talasila" for "Talasila, Inc." as the proper party to whom the citation should have been issued (App. 5a(2)). In May 1996, the ALJ notified "Talasila, Inc." to appear at the rehearing (App. 5a(5)).

The rehearing was scheduled for May 1996, and Mr. Mikkilineni requested a continuance in order to complete discovery and because of his counsel's abrupt withdrawal shortly before the hearing was to commence. The ALJ denied the request for a continuance and entered a default against Talasila for more than $150,000 when Mr. Mikkilineni failed to attend the hearing, without taking any testimony from the Secretary (App. 5a(3)).

On July 24, 1996, the Commission entered a final order against Talasila (App. 5a(3)). On August 5, 1996, the Commission changed the name in the final order from "Talasila" to "Talasila and its successors." (App. 5a(4)). On October 9, 1996, the Secretary made demand on Mr. Mikkilineni for the payment of $153,599.17 for the penalty, interest and other costs. (App. 6a).

On September 4, 1996, Mr. Mikkilineni filed a pro se appeal from the Commission decision to the Fifth Circuit Court of Appeals which said "I hereby appeal the OSHRC final order for review by this Honorable Court . . ." (App. 5a). The same day the Fifth Circuit captioned the Petition for Review as "Talasila, Inc. v. Reich" and served the Secretary (App. 7a). On September 16, 1996, counsel for the Secretary entered their appearance in "Talasila v. Sec. of Labor." (App. 8a).

On September 19, 1996, Mr. Mikkilineni requested that the Fifth Circuit review this appeal with another appeal which he had

taken which was then pending.[2] (App. 9a & 10a). The Secretary filed a response in opposition to the consolidation of the two appeals and raised the issue of whether Mr. Mikkilineni was seeking review as the successor to Talasila (App. 11a). Mr. Mikkilineni replied to the Secretary's response by stating that "Talasila" was defunct and that he, as the general partner, is the real party of interest/controversy for both Fifth Circuit appeals (App. 12a).

On November 6, 1996, the Fifth Circuit directed Mr. Mikkilineni to file his brief using the caption "Talasila, Inc. v. Robert B. Reich, Secretary of Labor" within 40 days (App. 13a). Mr. Mikkilineni filed his brief on December 23, 1996 (App. 14a) which the Court accepted on January 6, 1997 (App. 15a).

The Secretary's brief to the Fifth Circuit was filed on February 7, 1997, (App. 17a) and Mr. Mikkilineni's reply brief was mailed to the Court on February 25, 1997 by express mail (App. 18a). The Court returned Mr. Mikkilineni's reply brief without filing it on February 28, 1997.

On March 14, 1997 the Secretary mailed to the Fifth Circuit a "Motion to Dismiss or, In the Alternative, for a Declaration that Talasila, Inc. Is a 'Successor' to Talasila." (App. 4a). In that motion the Secretary argued that: (1) Mr. Mikkilineni filed the pro se Petition for Review on his own behalf and not on behalf of Talasila or Talasila, Inc., (2) Talasila, Inc. is not a proper party to the appeal because it was not aggrieved by the Commission's order, and (3) even if Talasila, Inc. was a proper party, the corporate entity was not represented by counsel.

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[2] M.R. Mikkilineni v. City of Houston, et al., C.A. No. 96-20471. The Petition for Writ of Certiorari for the dismissal of that appeal is presently pending before this Court at docket number 96-1891.

On March 27, 1997, retained counsel for petitioner mailed to the Fifth Circuit a "Response to Secretary of Labor's Motion to Dismiss or, in the Alternative, for a Declaration that Talasila, Inc. Is a 'Successor' to Talasila" in which it was argued that the correct party to the appeal was "Talasila." (App. 3a). In that pleading reference was made to "Petitioner's Motion to Amend the Caption by Substituting Parties" which was filed concurrently with an affidavit from M.R. Mikkilineni (App. 16a). The Petitioner requested the Fifth Circuit to deny the Secretary's motion to dismiss the petition.

On March 31, 1997, the Fifth Circuit returned the Response to the Secretary's Motion to Dismiss as well as the Petitioner's Motion to Amend the Caption by Substituting Parties without filing it because the court granted the Secretary's Motion to Dismiss (App. 1a, 2a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to remedy a gross injustice to an uncounseled litigant who was denied due process of law by the Court of Appeals when it denied his standing to intervene in the Petition for Review. Mr. Mikkilineni and Talasila violated no OSHA regulations yet there is a judgment against Talasila and its successors for more than $150,000. The ALJ's failure to grant Talasila a fair hearing and entering a default judgment without any testimony being given should have been remedied by the Fifth Circuit Court of Appeals. Instead of remedying that miscarriage of justice, that Court denied Petitioner herein the right to have the merits of his appeal considered because there was a question of who was the actual petitioner in that Court. This Court is respectfully requested to remedy this situation by remanding this case to the Fifth Circuit Court of Appeals so that it can consider the case on its merits.

I.

THE COURT OF APPEALS DENIED A LITIGANT ITS RIGHT TO DUE PROCESS OF LAW WHEN THE COURT DISMISSED THE APPEAL BECAUSE OF A QUESTION OF STANDING TO INTERVENE AND A WRONG PARTY WAS NAMED IN THE CAPTION AS THE PETITIONER.

It is respectfully submitted that the Fifth Circuit Court of Appeals' treatment of Petitioner herein is inconsistent with this Court's decisions as well as with those of other circuit courts.

Unfortunately, we don't have the benefit of the Fifth Circuit's reasoning when it granted the Secretary's motion to dismiss because it entered an order without opinion. In addition, the Fifth Circuit did not have the benefit of counsel's response to the Secretary's motion to dismiss because the response was returned without being filed.

The Secretary argued in the motion to dismiss that Talasila, Inc. was not the proper party to file the Petition for Review in the Fifth Circuit because the Commission's final order applied only to "Talasila and its successors." (App. 4a, @ 2). Mr. Mikkilineni's pro se Petition for Review did not designate the name of the party filing the petition, so the Fifth Circuit made Talasila, Inc. the petitioning party in its caption (App. 7a).

If there was confusion as to the party which filed the Petition for Review or who was the proper party to file such a petition, the Fifth Circuit could have requested clarification either sua sponte or in response to the Secretary's motion to dismiss. It also could have considered the Petitioner's response to the Secretary's motion (App. 3a). Instead of trying to give the petitioning party its day in court to review a $150,000 default

judgment unlawfully entered against it, the Fifth Circuit chose to violate the petitioners' right to due process of law as is guaranteed by the Fifth Amendment to the United States Constitution by dismissing its meritorious appeal.

In National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781 (1976), this Court held that the "extreme sanction of dismissal" is appropriate where there had been "flagrant bad faith" on the part of the party as well as "callous disregard" by counsel of their responsibility. The Petitioners herein did not deserve a similar sanction by the Fifth Circuit.

It is respectfully submitted that, in the case sub judice, the Fifth Circuit Court of Appeals violated Talasila and Mr. Mikkilineni's right to due process of law because it denied them access to a fair appellate review of the meritorious appeal of an unjust $150,000 sanction imposed unfairly by the Commission. The failure of an uncounseled pro se litigant to name the proper party in the Petition for Review, which failure did not prejudice the opposing party, cannot, under the circumstances in the instant case, justify a dismissal of the appeal.

Had the Fifth Circuit ordered Mr. Mikkilineni to find counsel or to file a response to the Secretary's motion to dismiss, and had Mr. Mikkilineni failed to follow that order, perhaps his petition for review should have been summarily dismissed. Here, not only did the Fifth Circuit not order Mr. Mikkilineni to file a response to the Secretary's motion, but it refused to accept counsel's timely response in opposition.

In addition, Mr. Mikkilineni had already filed his timely brief in support of the Petition for Review with the Fifth Circuit, and the Secretary's reply brief was also filed. Instead of considering the merits of the appeal, the Fifth Circuit chose to dismiss the appeal on the question of Mr. Mikkilineni's standing to appeal this matter.

In In Re Pittsburgh & L.E.R. Co., Etc., 543 F.2d 1058, 1064 (3d Cir. 1976), the court ruled that the question of standing to intervene does not go to whether or not the appeal should be heard but, rather, to its merits.

In Izumi Seimitsu v. US Philips Corp., 510 U.S. 27, 114 S. Ct. 425 (1993), this Court ruled that a person, who has been denied standing to intervene in a case before the circuit court, has standing to file a petition for certiorari to review that ruling.

This Court also ruled in Provident Tradesmen B. & T. Co. v. Patterson, 390 U.S. 102, 88 S. Ct. 733 (1968) that when necessary, the court of appeals should, on its own initiative, take steps to protect a non-party where the judgment may impair or impede the party's ability to protect its interest in the subject matter. Contrary to that ruling, in the case sub judice, the Fifth Circuit did not take the steps, on its own initiative, to protect Mr. Mikkilineni's interest. Instead, it dismissed his appeal, presumably because he had no standing to appeal as a non-party. The court should have considered Mr. Mikkilineni, an uncounseled litigant, as an intervener and heard the merits of the case rather than dismissing it.

The Fifth Circuit's decision to dismiss M.R. Mikkilineni's petition for review only allowed the Commission's improperly modified order to stand, where the Commission changed its final order from "Talasila" to "Talasila and its successors." (App. 5a(4)). In NLRB v. Local 476, Plumbing and Pipefitting, 368 U.S. 401, 82 S. Ct. 423 (1962), this Court ruled, in an enforcement proceeding, that the Court of Appeals improperly modified the order by striking the references to "any other employer" to "any other employer or person", and therefore granted certiorari and remanded the case.

This Court is being asked to correct a clear violation of a pro se litigant's access to the circuit courts of appeals in this

country when he unintentionally failed to follow proper protocol. This Court cannot allow the injustice wrought on the Petitioner in this case to stand, especially when the amount in controversy ($153,000) was awarded to the Secretary through the default of an uncounseled litigant.

This Court has the power to grant certiorari, vacate and remand in a case in which an injustice has been done in the court below. Lawrence v. Chater, ___ U.S. ___, 116 S. Ct. 604 (1996). It is respectfully submitted that this is such a case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or, in the alternative, this Court should use its inherent power to remand this case to the Fifth Circuit Court of Appeals with instructions to consider the case on its merits.

Respectfully submitted.

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412/281-6800

Counsel for Petitioners

APPENDIX

1a -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MARCH 31, 1997 GRANTING THE SECRETARY'S MOTION TO DISMISS

2a -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MARCH 31, 1997 DENYING PETITIONER'S MOTION FOR LEAVE TO FILE REPLY BRIEF OUT OF TIME

3a -- PETITIONER'S RESPONSE TO SECRETARY OF LABOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A DECLARATION THAT TALASILA, INC. IS A 'SUCCESSOR' TO TALASILA

4a -- SECRETARY OF LABOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A DECLARATION THAT TALASILA, INC. IS A 'SUCCESSOR' TO TALASILA

5a -- M.R. MIKKILINENI'S LETTER TO FIFTH CIRCUIT COURT OF APPEALS APPEALING THE OSHRC FINAL ORDER WITH ATTACHMENTS 5a(1) TO 5a(5)

6a -- LETTER TO M.R. AND RUPA MIKKILINENI FROM OSHA DATED OCTOBER 9, 1996 DEMANDING PAYMENT OF $153,000+

7a -- FIFTH CIRCUIT COURT OF APPEAL LETTER TO OSHA DATED SEPTEMBER 4, 1996 WITH CAPTION AS TALASILA INC. V. REICH

8a -- APPEARANCE OF COUNSEL FOR SECRETARY IN THE CASE TALASILA V. SECRETARY OF LABOR

9a -- LETTER TO FIFTH CIRCUIT COURT OF APPEALS FROM M.R. MIKKILINENI DATED SEPTEMBER 19, 1996 REQUESTING ONE PANEL TO REVIEW BOTH APPEALS

10a -- LETTER FROM FIFTH CIRCUIT COURT OF APPEALS REGARDING CONSOLIDATION OF APPEALS

11a -- SECRETARY OF LABOR'S RESPONSE TO CONSOLIDATE

12a -- M.R. MIKKILINENI'S REPLY TO SECRETARY OF LABOR RESPONSE TO CONSOLIDATE TWO APPEALS AT REVIEW

13a -- LETTER FROM FIFTH CIRCUIT COURT OF APPEALS TO M.R. MIKKILINENI DATED NOVEMBER 6, 1996

14a -- LETTER TO FIFTH CIRCUIT COURT OF APPEALS FROM M.R. MIKKILINENI DATED DECEMBER 23, 1996

15a -- FIFTH CIRCUIT'S MEMORANDUM DATED JANUARY 6, 1997 GRANTING MOTION TO FILE BRIEF AND RECORD EXCERPTS OUT OF TIME

16a -- PETITIONER'S MOTION TO AMEND CAPTION BY SUBSTITUTING PARTIES

17a -- SECRETARY'S BRIEF TO FIFTH CIRCUIT FILED ON FEBRUARY 7, 1997

18a -- M.R. MIKKILINENI'S REPLY BRIEF TO FIFTH CIRCUIT SUBMITTED ON FEBRUARY 25, 1997 BUT NOT FILED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60588

TALASILA, INC.
Petitioner

v.

FILED
MAR 31 1997

ROBERT B. REICH, Secretary of Labor
Respondent

Petition for Review of an Order of the
Occupational Safety & Health Rev. Comm.

Before KING, JOLLY and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the respondent's motion to dismiss the petition for review is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60588

TALASILA, INC.
Petitioner

v.

FILED
MAR 31 1997

ROBERT B. REICH, Secretary of Labor
Respondent

Petition for Review of an Order of the
Occupational Safety & Health Rev. Comm.

ORDER:

IT IS ORDERED that petitioner's motion for leave to file the reply brief out of time is DENIED AS MOOT.

/s/ James L. Dennis

JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60588

TALASILA, INC.,
Petitioner,

v.

CYNTHIA A. METZLER, ACTING SECRETARY OF LABOR
Respondent

RESPONSE TO SECRETARY OF LABOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A DECLARATION THAT TALASILA, INC. IS A "SUCCESSOR" TO TALASILA

COMES NOW, Talasila, Inc., petitioner above-named, by its lawyer, Michael L. Rosenfield, pursuant to F.R. App. P. 27, and submits the following as its Response to Secretary of Labor's Motion to Dismiss or, in the Alternative, for a Declaration that Talasila, Inc. is a "Successor" to Talasila:

INTRODUCTION

The identity of the parties has been a problem in this matter almost since the outset. M.R. Mikkilineni, an uncounseled litigant, filed this appeal and the accompanying brief on behalf of

Talasila, Inc. However, the proper party in this matter is Talasila since it is the party in the proceeding below and no party has been substituted for it.

1. Petitioner admits the allegations made in paragraphs 1-7 of the Secretary's motion.

2. Petitioner denies the allegations made in paragraph 8 of the Secretary's motion because Petitioner's Reply Brief was filed out of time and was returned to Petitioner (A resubmitted Reply Brief is being filed with the court concurrently with the filing of this Response and Petitioner's Motion to Amend the Caption by Substituting Parties).

As is shown in Petitioner's Motion to Amend the Caption by Substituting Parties and in the accompanying affidavit of M.R. Mikkilineni, the real party in interest in this matter is Talasila. The use of Talasila, Inc. as the Petitioner was an error.

By the way of further answer, current counsel entered his appearance on behalf of Petitioner "Talasila, Inc." because that was the designation in the caption.

WHEREFORE, Petitioner respectfully requests this court to deny the Secretary's Motion to Dismiss or to Declare Talasila, Inc. as a Successor to Talasila.

Respectfully submitted,

SD

Dated: March 27, 1997

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TALASILA, INC.
Petitioner

v.

CYNTHIA METZLER,
ACTING SECRETARY OF LABOR,
Respondent

No. 96-60588

SECRETARY OF LABOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A DECLARATION THAT TALASILA, INC. IS A "SUCCESSOR" TO TALASILA

INTRODUCTION

In her previous filings, the Secretary has noted that the identity of the petitioning party had not been made clear, and that depending on the petitioner's identity, the petition might have been filed improperly. Recently, an attorney has entered an appearance and filed a motion on behalf of the Petitioner, and both documents state that the Petitioner in this case is Talasila, Inc. Based on these representations, the Secretary now moves to dismiss the petition for lack of jurisdiction.

The Court lacks jurisdiction for two reasons. First, Talasila, Inc. is not "adversely affected or aggrieved" by the Commission's order. Second, Talasila, Inc., has not filed a petition for review within the time required by the judicial review provision of the Occupational Safety and Health Act ("OSH Act" or "Act").

29 U.S.C. @660(a), and there is no other petitioner named in these proceedings. In support of these contentions, the Secretary states as follows.

BACKGROUND

1. The OSH Act provides that any "person adversely affected or aggrieved" by a Commission final order can obtain judicial review by filing a petition for review in the appropriate United States circuit court of appeals "within sixty days following the issuance" of the Commission's order. 29 U.S.C. @660(a). This sixty-day limit is jurisdictional; the court may not review the Commission's order if the petition for review is not timely filed. Consolidated-Andy, Inc. v. Donovan, 642 F.2d 778 (5th Cir. Unit A Apr. 1981).

2. The Commission's final order was issued on July 24, 1996, the date it became final by operation of law. See Consolidated-Andy, 642 F.2d at 779; @ 661(j). The statutory review period expired September 22, 1996. Accordingly, a valid petition for review had to be filed by that date for this Court to have jurisdiction to review the Commission's final order.

3. The original respondent below was Talasila, Inc., but four months before the Commission entered its final order Talasila the partnership was substituted as the named respondent. The Commission final order, by its express terms, binds only Talasila and its successors. See Brief for the Secretary of Labor 23-24, 27-29.

4. In the proceedings below, M.R. Mikkilineni represented Talasila, Inc., and then Talasila, see, e.g., Brief of Petitioner's

Representative 44-46 (although in his reply brief he insists that he appeared as an intervenor to defend his competency, Reply Br. 3).[1] He was a partner and general manager of Talasila, and has been conducting litigation as trustee of Talasila. However, although he was the incorporator and an original board member of Talasila, Inc., he has never owned any shares in the corporation and he resigned his position as a director soon after the corporation was formed. R:100 at Exh. 1, pp. 65-68. According to his own testimony, he is not an officer or director of the corporation and is not empowered even to receive legal service on its behalf. Id.; R:100 at Exh. 3.

5. On September 4, 1996, eighteen days before the expiration of the statutory review period, Mikkilineni filed the instant petition for review pro se. The Secretary noted that the petition failed to specify the identity of the Petitioner and that the petitioning party would therefore have to be identified. Secretary's

[1] The suggestion that Mikkilineni appeared as an intervenor was first raised in his opening brief to this Court. Although his Reply Brief claims that he appeared as an intervenor, it does not dispute the Secretary's point, Brief for the Secretary of Labor 31 n.21, that no motion to intervene was ever made. And the documents in the record below indicate only that he was representing the "Respondent." Admittedly, however, it is not always clear whom he was representing as Respondent at any given time; even before Talasila was substituted as a Respondent, he used its letterhead and occasionally referred to Talasila as the Respondent or sought relief on behalf of the partnership. See, e.g., Respondent's Motion for Allowing Response Brief/Extension of Time (attached as addendum 2); Letter of 1/3/95 requesting recision of Order of 12/28/94 (attached as addendum 3); Letters of 10/12/93 and 2/15/94, reprinted in Record Excepts @ 2. Similarly, after the amendment, he often used Talasila, Inc.'s letterhead and referred to the corporation as the Respondent. E.g., R:88a; R:96; R:102.

Response to Motion to Consolidate 3. The petition was part of a letter relating to a separate proceeding and contained no caption for this proceeding.[2] In the petition, Mikkilineni stated that "I hereby appeal the OSHRC final order for review by this Honorable Court," suggesting that Mikkilineni was seeking review on his own behalf. The administrative decision for which the petition sought review, however, is captioned "Talasila and its successors."

6. The Secretary further noted that she was reserving the "right to seek dismissal of either Talasila, Inc., Talasila, or other entity" once the petitioning party was identified. Secretary's Response to Motion to Consolidate 3 n.3. But because it was possible that Mikkilineni had filed the petition on his own behalf as a successor to Talasila, the Secretary did not seek dismissal at that time. See id. at 3.

7. Petitioner's opening brief, filed by Mikkilineni, did not clarify the identity of the Petitioner. The Secretary noted that Mikkilineni could only represent himself, and accordingly, the Secretary's responsive brief argued that the petition should be dismissed unless Mikkilineni acknowledged, underoath, that he was a successor to Talasila. Brief for the Secretary of Labor 26-29.

8. Petitioner's reply brief, submitted out-of-time by Mikkilineni, neither identified the Petitioner nor acknowledged Mikkilineni's status as a successor to Talasila. Thereafter an attorney entered an appearance form stating that the attorney represents "Talasila, Inc." as the "petitioner." A subsequently filed motion states that Mikkilineni "filed the above-captioned appeal on behalf of Talasila, Inc." Petitioner's Motion to File Reply Brief Out of Time 1 @ 1. The motion twice elsewhere indicates that

[2] The record excerpts recently filed by Petitioner includes the wrong document as the petition for review. A copy of the petition for review is attached to this Motion as addendum 1. The Court's letter transmitting the petition captioned the proceeding as "Talasila, Inc. v. Reich."

Talasila, Inc. (and not Mikkilineni) is the Petitioner. Id. at 2 @ 6 ("Recently petitioner retained the undersigned to represent it in this matter" (emphasis added); id. at signature block ("Lawyer for Petitioner [--] Talasila, Inc.")

ARGUMENT

I. Talasila, Inc. is not Adversely Affected or Aggrieved by the Commission's Order

This Court's jurisdiction is limited to petitions filed by persons and entities "adversely affected or aggrieved" by a Commission order. 29 U.S.C. @ 660(a). As we have explained before, the Commission's order is directed to "Talasila and its Successors." Moreover, Mikkilineni has consistently insisted that Talasila and Talasila, Inc. had separate legal identities and were not related companies. Therefore, by its terms the order does not impose any penalty or obligations on Talasila, Inc.

Under these circumstances, Talasila, Inc. is not "adversely affected or aggrieved" by the Commission's order. See R.T. Vanderbilt Co. v. OSHRC, 708 F.2d 570 (11th Cir. 1983) (firm whose economic interests harmed by Commission finding nevertheless not affected within meaning of OSH Act and could not obtain judicial review); compare RSR Corp. v. Donovan, 733 F.2d 1142, 1145-46 (5th Cir. 1984) (employer who was assessed penalty could obtain review even though order not final). Having no interest legally cognizable in this proceeding, the corporation lacks standing to seek review. See R.T. Vanderbilt, 708 F.2d 570. Thus, this Court lacks jurisdiction over the corporation's petition for review.

It is possible that Talasila, Inc. is a successor to Talasila, in which case it would have standing to obtain review. That the corporation now does construction work, instead of its originally

stated purpose to market engineering services, R:97 at 2; R:100 at Exh. 1, p. 67; and, if Mikkilineni is to be believed, is attempting to obtain review of an order directed against Talasila and its successors, suggest that the corporation is in fact a successor.[3]

But Talasila, Inc. has not formally admitted that it is a successor, and Mikkilineni's statements and actions, if his past statements concerning his relationship to the corporation are believed, cannot be considered to be an admission by the corporation. Moreover, successor liability is a fact-based determination usually made during enforcement proceedings, and therefore this Court is not well-placed to determine whether Talasila, Inc. is a successor to Talasila.

Nevertheless, if the Court denies this motion to dismiss, it should declare that Talasila Inc.'s actions in seeking review establish that it is a successor to Talasila and therefore subject to the terms of the Commission order. The Secretary's rights under the order should not be placed in jeopardy (however slightly, see Brief for the Secretary of Labor) by an entity that will in enforcement proceedings claim not to be subject to the order. There can be no doubt, given Mikkilineni's tactics, that Talasila,

[3] Moreover, Mikkilineni's inconsistent statements on whom he represented, see supra note 1, and his strategy of making statements and arguments on behalf of one entity that work against the other entity he purports to represent suggest that these artificial entities have no separate existence apart from himself -- he makes such statements and arguments without regard to their impact on the entities, but only as attempts at legal maneuvering to avoid having any entity responsible. Such statements, in any event, undercut his argument that the Secretary "willfully" cited and litigated against the wrong entity, and that he bears no responsibility for the confusion; even now he makes statements that purport to be on behalf of one entity but are against that entity's interest and reflect that he is seeking to protect wholly separate interests.

Inc. will oppose enforcement efforts against it on these grounds. By declaring Talasila Inc. to be a successor, the Court can prevent Mikkilineni and the corporation from manipulating corporate titles and forms to confound and abuse the legal process.

II. The Court Lacks Jurisdiction Because No One Authorized to File a Petition on Behalf of Talasila, Inc. has Done so

A corporation can only initiate judicial proceedings through duly authorized agents of the corporation. See generally 9 Fletcher Cyc. Corp. @ 4216 (Perm ed. Callaghan & Co. 1985). Based on Mikkilineni's statements, Talasila, Inc. is separate from Talasila, and he is neither an officer nor a director of Talasila, Inc. nor is he empowered even to accept service on its behalf. Thus, the evidence strongly suggests that he was not authorized to initiate these review proceedings on behalf of Talasila, Inc. But see supra note 3 (suggesting that the record indicates there is no legal distinction between Mikkilineni and Talasila, Inc.).[4]

[4] Indeed, it appears most likely that the corporation, to the extent it has a separate existence and is acting in its own best interests, would not authorize Mikkilineni to file a petition for review on its behalf. As explained above, the Commission order does not impose any obligations on the corporation, unless it is a successor to Talasila. Seeking review of the order can only increase the possibility that it will found to be a successor to Talasila and thus subject to the order. Similarly, a rational corporation would support, or at least not oppose, the interlocutory order that dismissed it from the proceedings and brought in a different respondent. But one of Mikkilineni's main arguments has been that the order substituting Talasila for the corporation was improper. Finally, the key (and in the Secretary's view dispositive) issue in this appeal is whether the default judgment was proper, which was entered because of Mikkilineni's willful (and still unexplained) failure to appear. Accordingly, it is not even clear that the corporation's and Mikkilineni's interests are aligned rather than adverse.

Moreover, Mikkilineni has not claimed to be a petitioner or to have filed the petition on Talasila's (the partnership) behalf, and in fact apparently now disavows such a reading of the petition for review. Accordingly, no potential party has filed a petition for review within the time prescribed by the OSH Act, and this Court lacks jurisdiction over the petition. See Consolidated Andy, 642 F.2d at 779.[5]

WHEREFORE, the Secretary requests that his motion to dismiss be granted. In the alternative, the Court should declare Talasila, Inc. to be a successor to Talasila before allowing the petition for review to proceed.

Respectfully submitted,

J. DAVITT McATEER
Acting Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

8

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[5] Although up to now Mikkilineni had left the identity of the Petitioner unclear, he never indicated that more than one person or entity was seeking review. Indeed, even after being advised that the identity of the Petitioner had to be clarified, he consistently referred to the Petitioner in the singular. E.g., "Brief of Petitioner's Representative"; "Reply-Brief of Petitioner's Representative." Thus, any attempt to add a second Petitioner at this stage would be untimely and violative of Rule 15(a) of the Federal Rules of Appellate Procedure. Fed. R. App. Pr. 15(a) ("The petition must name each party seeking review . . . . Use of such terms as 'et al.,' or 'petitioners,' or 'respondents' is not effective to name the parties"); see also Fed. R. App. Pr. 15(d) (motion to intervene must be made within 30 days of filing of petition for review).

BRUCE JUSTH
Assistant Counsel for
Appellate Litigation

SD

RONALD J. GOTTLIEB
Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room S-4004
Washington, D.C. 20210

(202) 219-6610

Date: March 14, 1997

M.R. MIKKILINENI, PE
PO BOX 699
Ingomar, PA 15127
412 935 9752

9/2/96
by EXP. MAIL

US Court of Appeals
5th Circuit
600 Camp St.
New Orleans, LA 70130

RECEIVED
Sep. 4, 1996

Atten: Eileen Boudoin

Ref: #96-20471 - Mikkilineni v. City of Houston

Honorable Court:

Reference is made to your letter of 8/8/96 regarding whether all of the claims as to all of the parties have been disposed of and whether the judgment entered is appealable in the absence of certification by the district court. The answer to this is- YES.

Reference is made to Nancy Dolly's letter of 8/8/96, and I as a pro se litigant request a briefing checklist and the RECORD to prepare my brief. Based on the briefing notice, my brief is due on or before 9/20/96. However, on a related matter OSHRC entered a final order on 7/24/96 which must be appealed to the 5th Circuit within 60 days. While I keep working on these briefs, I am also looking for an attorney to represent me in these matters. For this reason, I require additional time to prepare and file my brief. I request the court to extend the due date for my brief until 11/30/96.

FILED
SEP. 4. 1996

I hereby appeal the OSHRC final order for review by this Honorable Court, and the following relevant record is attached:

1. OSHRC's decision and order of 2/21/96 removal of ALJ and remand to a new ALJ upon Mikkilineni's appeal.

2. OSHRC's order of 2/26/96 remand/reassign to new ALJ

3. ALJ's order of 3/15/96 allowing the Secretary to amend the citations originally issued in early 1993, and change the caption of the complaint filed 1993-94 from Talasila Inc., a corporate party to Talasila, a partnership.

4. Default decision and order of ALJ against Talasila on 5/14/96

5. Mikkilineni's appeal to OSHRC for review dated 6/17/96

6. OSHRC final order of 7/25/96

7. OSHRC's order of 8/5/96 allowing the Secretary to amend the citations/complaint again, one more time, to include the individuals- M.R. Mikkilineni and Rupa Mikkilineni

8. Mikkilineni's notice of appeal of 8/30/96 on OSHRC final order.

Factual background:

Talasila, a partnership with M.R. Mikkilineni as the general partner, was the contractor on a pump station project for the City of Houston. The City engineer, who admitted total ignorance related to trench safety/soil stability or OSHA safety standards, complained to OSHA several times during 1993 against Talasila for the violation of safety standards.

During Feb./March and May/June 1993, the OSHA Inspectors appeared unannounced and conducted wall to wall inspections of Talasila's work facility several times and issued citations amounting to over $150,000 in the name of Talasila Inc., a corporate party, knowing that it was the wrong party. These citations were never properly served upon Talasila, the contractor or M.R. Mikkilineni, the general partner or Rupa Mikkilineni, who was attending a law school at that time. There were no safety violations or incidents at this site at any time and all work was completed under the direction of a Registered professional engineer, who was familiar with safety standards.

In 1993-94, the Secretary filed complaints against Talasila Inc., refused to issue the citations and file complaint on the name of Talasila, the contractor, even though Mikkilineni repeatedly reported the facts to OSHA and OSHRC.

In Oct. 1994, OSHRC's ALJ conducted a hearing in Houston, TX after refusing to allow Talasila Inc. to discover relevant facts/documents from OSHA. At this hearing, the ALJ did not allow Talasila Inc. to fully cross-examine OSHA's witnesses, and after 2.5 days of testimony from OSHA witnesses the ALJ removed Talasila Inc.'s representative from participating in the hearing.

On 2/21/96, OSHRC Commissioners removed the ALJ and remanded/reassigned the case to a new ALJ. However, the

Commissioners did not rule on Talasila Inc.'s discovery requests. According to Commissioner Weisberg, "it would be premature to determine whether the ALJ properly handled discovery until a decision is rendered on the merits". Whereas Commissioner Montoya believed that "judicial economy would best be served by resolving the discovery issue now and discovery issues are central to the case.."

Inspite of Commissioner Montoya's wise observations on discovery issues, the new ALJ decided to allow only two of the OSHA witnesses to be cross-examined at the hearing; and the hearing was set for 5/14/96 in Houston, TX, without allowing discovery of relevant facts/documents. The ALJ also granted Secretary's motion to amend the citations/complaint replacing Talasila Inc. with Talasila as the party, after a lapse of nearly 2.5 years.

Talasila, the new party to this action could not secure legal counsel due to lack of finances. Mikkilineni, as the general partner once, promptly motioned the ALJ to allow discovery and to delay the hearing set for 5/14/96 giving additional time to prepare. The ALJ denied Mikkilineni's requests and went ahead with the hearing in Houston on 5/14/96 and entered a DEFAULT judgment against Talasila, who was not properly served with citations/complaint at any time. The ALJ entered the default judgment without reviewing the evidence on the record.

The OSHRC Commissioner's let ALJ's decision as final, and subsequently granted Secretary's motion to amend citations/complaint in the name of individuals, M.R. Mikkilineni, father, and Rupa Mikkilineni, daughter who recently graduated from Law School.

The issues to be reviewed by this Honorable Court:

1. Whether or not Talasila the contractor and the proper party to be cited for the alleged OSHA violations?

2. Whether the Secretary willfully cited/filed complaint on Talasila Inc., a wrong party?

3. Whether the Secretary affectuated proper service of citations/complaint on Talasila, the partnership or the individuals M.R. and Rupa?

4. Whether the ALJ/OSHRC abused its discretion in allowing the Secretary to amend the citations/complaint at will after a lapse of nearly 3 years from the date of original filing?

5. Whether the ALJ/OSHRC abused its discretion by ordering a limited hearing on 5/14/96 after denying discovery request, and entering a default judgment against Talasila inspite of the clear evidence on the record that OSHA witnesses PURJURED under oath.

A brief will be filed on these issues for review and ruling by this Honorable Court. Please file this appeal for review and advise on the amount of court filing fee.

Respectfully,

SD

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

cc: Siemer
Robinson-Gaither
Mick

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,
Complainant,

v.

OSHRC Docket Nos. 93-1181, 93-1372, 93-241[1]

TALASILA, INC.,
Respondent

DECISION AND ORDER

BEFORE: WEISBERG, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

This case is before the Commission on interlocutory appeal to determine whether Administrative Law Judge Louis LaVecchia abused his discretion by barring Respondent's representative from the hearing while allowing the Secretary to continue his examination of witnesses. For the reasons that follow, we find that the judge did abuse his discretion and we remand the matter for further proceedings.

[1] The Secretary moved to consolidate these three docket numbers and submitted an appropriate order to the judge for his signature. The official file contains no signed copy of any order consolidating these cases, so we order that OSHRC Docket Nos. 93-1181, 93-1372, and 94-241 be consolidated.

I. Background

Pursuant to a complaint filed by an engineer with the City of Houston, Texas, an OSHA compliance officer inspected a worksite where Talasila, Inc. ("Talasila"), was building a new pump station for the city's sewer system. As a result of the inspection, Talasila was issued several citations, including two citations for violation of OSHA excavation standards. After the inspection, the same engineer requested a reinspection because, in his view, there was no improvement in Talasila's safety measures. As a result of the reinspection, Talasila was issued a citation alleging willful violations of the OSHA excavation standards. A third inspection resulted in additional citations and the posting of a notice of imminent danger that the company apparently ignored.

Throughout the proceedings Talasila was represented by M.R. Mikkilineni, a professional engineer and, apparently, a general partner of Talasila. A major part of the defense put forward by Mikkilineni involved the allegation that the complaints and subsequent citations were the result of a vendetta the City of Houston had waged against Talasila after the company complained about waste and inefficiencies at the project. To prove this allegation, Mikkilineni repeatedly attempted, during discovery, to obtain documents he expected would show that Talasila had been singled out for harassment. Many of these discovery requests were denied by the judge on the grounds that they were not relevant to whether Talasila violated the cited standards.

At the hearing, Mikkilineni repeatedly attempted to cross-examine the Secretary's witnesses regarding the alleged harassment. He also attempted to introduce exhibits bearing on harassment. The judge refused to allow many of these exhibits into evidence and upheld the Secretary's objections to entire lines of cross-examination. The transcript also reveals that, although the judge attempted to give Mikkilineni considerable leeway, the level of friction between the judge and Mikkilineni steadily increased as the hearing proceeded.

On the third day of the hearing, the judge barred Mikkilineni from representing Talasila. He declared that the evidence was totally against Talasila and that Mikkilineni's behavior was "somewhat obstructive." The judge also told Mikkilineni "[y]ou ask questions on cross-examination that are entirely irrelevant, and you are just wasting time, extending the hearing." The judge gave Mikkilineni an opportunity to stay in the hearing room as an observer. However, Talasila was not given an opportunity to obtain alternative representation and was therefore unable to either cross-examine the Secretary's witnesses or present witnesses in its own defense. After Mikkilineni chose to leave, the judge allowed the Secretary to present the direct testimony of two witnesses.

Judge LaVecchia later scheduled a second hearing to allow Talasila to present its defense, but he canceled it after receiving a letter from Mikkilineni which noted that the judge had not yet issued his decision. In an order canceling the second hearing, the judge interpreted this comment as a complaint that he had not issued a decision, and informed the parties that he was preparing his decision. Shortly after his receipt of the cancellation, Mikkilineni filed this interlocutory appeal,[2] which we granted before the judge issued a decision.

II. Discussion

Many employers, like Talasila, elect to appear before the Commission represented by a company official who is not trained in the law or familiar with legal procedure and evidence. The Commission has recognized the difficulties faced by the pro se

[2] We note that Talasila has apparently filed a collateral action in the United States District Court for the Southern District of Texas. We have not received any of the pleadings in that matter. However, from what we can gather from Talasila's various filings, the case involves the allegation that the company was being harassed by the Secretary of Labor.

non-lawyer participating in our proceedings. *See, e.g., Sealtite Corp.*, 15 BNA OSHC 1130, 1991-93 CCH OSHD @29,398 (No. 88-1431, 1991); *Choice Electric Corp.*, 14 BNA OSHC 1899, 1901, 1987-90 CCH OSHD @29,141, p. 38,942 (No. 88-1393, 1990); *Monroe & Sons, Inc.*, 4 BNA OSHC 2016, 2017, 1976-77 CCH OSHD @21,470, 25,773 (No. 6031, 1977). However, there are limits to how far the Commission can bend its procedures to accommodate an inexperienced representative and *pro se* litigants are not exempt from following Commission rules and procedures, *Imageries*, 15 BNA OSHC 1545, 1547, 1991-93 CCH OSHD @29,639, p. 40,131 (No. 90-378, 1992).

This record establishes that in his representation of Talasila, Mikkilineni tested those limits. Throughout the discovery process, Mikkilineni repeatedly attempted to obtain documents that the judge determined had no bearing on the merits of the citations. Mikkilineni took a similar course at the hearing in attempting to cross-examine the Secretary's witnesses and introduce photographs and documents on matters that the judge found were not relevant to the alleged violations.[3] As the judge noted, the delays caused by Mikkilineni's actions added at least a day to the hearing.

A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules or Procedure or the judge's orders. *See, e.g., Sealtite Corp.*, 15 BNA OSHC at 1134, 1991-93 CCH OSHD at p. 39,583. However, when a judge determines that a party or its representative should be excluded from a hearing, as Judge LaVecchia did here, Commission Rule

[3] Mikkilineni did not make an offer of proof with respect to the excluded evidence. Nor did the judge suggest that he do so in lieu of continuing to challenge the judge's ruling.

104(b), 29 C.F.R. @104(b)[4], requires that the judge state the cause for the exclusion in writing or on the record and, if the person removed is the party's representative, the party must be given an opportunity to obtain another representative. Here, the judge's decision to continue the hearing without giving Talasila an opportunity to obtain alternative representation as required by the rule was an abuse of discretion. The judge also failed to state an adequate basis for the exclusion. His characterization of Mikkilineni's behavior as "somewhat disruptive," is not sufficient to establish adequate "cause" as required by Commission Rule 104(b). Moreover, by not allowing Talasila an opportunity to obtain other representation, the judge effectively precluded Talasila from cross-examining the Secretary's witnesses and presenting its own evidence. The judge thus also violated 5 U.S.C. @556(d) of the Administrative Procedure Act, which gives a party the right

> to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

We remand this case to the chief judge for reassignment to another judge. As a general rule, we are reluctant to reassign cases.

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[4] @2200.104 Standards of conduct.

....

(b) Misbehavior before a Judge-(1) Exclusion from a proceeding. A Judge may exclude from participation in a proceeding any person, including a party or its representative, who engages in disruptive behavior, refuses to comply with orders or rules of procedure, continuously uses dilatory tactics, refuses to adhere to standards of orderly or ethical conduct, or fails to act in good faith. The cause for the exclusion shall be stated in writing, or may be stated in the record if the exclusion occurs during the course of the hearing. Where the person removed is a party's attorney or other representative, the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or other representative.

In this case, however, we believe that reassignment would be the best course for all concerned. Further, because the judge failed to comply with Commission Rule 104 in excluding him, Mikkilineni is permitted to represent Talasila on remand. We caution Mikkilineni, however, that he or any other representative, will be expected to obey the judge's ruling and to comply with the Commission's rules[5] or the judge may, consistent with this decision and Commission Rule 104(b), properly exclude them from any further proceedings.

Accordingly, the matter is remanded to the Chief Judge with directions consistent with this decision.

SD

Stuart E. Weisberg
Chairman

SD

Velma Montoya
Commissioner

Dated: February 21, 1996

[5] The Commission does not reach the issue of whether the judge improperly denied Talasila's discovery requests. In Chairman Weisberg's view, it would be premature to determine whether the judge properly handled discovery until a decision is rendered on the merits. Commissioner Montoya, on the other hand, believes that judicial economy would best be served by resolving the discovery issue now. She notes that the discovery issues are central to the case and that if the judge's decision on the merits is reviewed by the Commission, it is likely that the outcome will largely be determined by the propriety of the judge's discovery orders.

The interlocutory appeal also raised the issue of whether to grant the Secretary's motion to amend the citation to name "Talasila, as opposed to 'Talasila, Inc.,'" as the correct employer. While a motion to amend the citation was made before Judge LaVecchia, the record does not indicate that it was ruled on. The Commission finds that the resolution of this issue is best left to the judge assigned to the case.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION

SECRETARY OF LABOR,
Complainant,

v. Docket Nos. 93-1181, 93-1372
94-241

TALASILA, INC.
Respondent

ORDER

Pursuant to the Notice of Remand Order issued by the Commission on February 21, 1996, the captioned cases are reassigned to Judge James Barkley for all purposes set forth in the remand order and for ultimate final disposition.

SD

IRVING SOMMER
Chief Judge

DATED: Feb. 26 1996
Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. Speer Boulevard
Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,
Complainant,

v.

TALASILA,
Respondent.

OSHRC DOCKET
NOS. 93-1181, 93-1372
and 94-241
(CONSOLIDATED)

ORDER

After the hearing concluded, the Secretary moved to amend the citation to reflect "Talasila" rather than "Talasila, Inc." as the proper Respondent. Throughout the proceedings Respondent noted that the proper Respondent was "Talasila," however, Respondent objected to the motion. There is no surprise or prejudice to Respondent. Complainant's motion to correct the caption is GRANTED.

SD

James H. Barkley
Judge, OSHRC

Dated: March 15, 1996

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,
Complainant,

v.

OSHRC Docket Nos. 93-1181
93-1372
94-0241

TALASILA,
Respondent.

NOTICE OF FINAL ORDER

The petition for discretionary review filed by the Respondent in the above cited action was received by the Commission on July 1, 1996. The case was not directed for review. Therefore, the decision of the Administrative Law Judge became a final order of the Commission on July 24, 1996, Commission Rule 90(d), 29 C.F.R. @2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. @661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE

FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. @660.

FOR THE COMMISSION

SD

Dated: July 25, 1996

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. Speer Boulevard
Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,
Complainant,

v.

TALASILA,
Respondent.

OSHRC DOCKET
NOS. 93-1181, 93-1372
& 94-241
(CONSOLIDATED)

APPEARANCES:

For the Complainant:
Robin S. Horning, Esq., Connie M. Ackermann, Esq. Office of the Solicitor, Department of Labor, Dallas, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Talasila, Inc. (Talasila), at all times relevant to this action maintained a place of business at 258 Mississippi Street, Houston, Texas where it was engaged in construction of a sewer pump station (Tr. 269). Respondent admits it is an employer engaged in construction, a business affecting commerce and is subject to the requirements of the Act. *Clarence M. Jones d b a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD 26,516 (No. 77-3676, 1983); *see also*, Tr. 269 [Respondent used curing material manufactured out of state].

On February 19, March 29, and May 28, 1993 the Occupational Safety and Health Administration (OSHA) conducted inspection of Talasila's Mississippi Street worksite. As a result of those inspections, Talasila was issued citations alleging violations of the Act, together with proposed penalties. By filing a timely notice of contest Talasila brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 4-6, 1994, a hearing was held before Administrative Law Judge Louis LaVecchia in Houston, Texas, at which time Talasila's principal represented Talasila, *pro se*. Prior to issuance of a decision, Talasila took an interlocutory appeal to the Commission. Talasila's appeal was granted, and the case was reassigned to the undersigned with directions that the record be reopened and Respondent be allowed to cross examine two of Complainant's witnesses from the original hearing. The new hearing was set for May 14, 1996.

Prior to the hearing, Respondent, through its attorney, filed motions requesting the reopening of discovery and renewing pre-hearing motions disposed of in the original hearing. Respondent's motions, though beyond the scope of the Commission's remand order, were considered and denied on their merits. On April 30, 1996, following the undersigned's denial of Respondent's motion for reconsideration, Respondent's attorney filed a motion for withdrawal, citing friction with his client over the client's insistence

on managing the case, and stating that the Respondent was prepared to represent himself. The motion was granted.

Talasila's subsequent request for a continuance was denied based on Respondent's familiarity with the case through his handling of the matter before Judge LaVecchia.

On May 8, 1996, following this judge's denial of its motions for reconsideration, Talasila informed the undersigned of its intent to file a second interlocutory appeal. Respondent was informed that filing such an appeal would not automatically stay the scheduled hearing, and that failure to appear would result in the entry of a default judgment.

On May 14, 1996 the hearing was convened in Houston, Texas. No representative for the Respondent appeared. Accordingly, pursuant to Commission Rule of Procedure @2200.64, it is ordered;

ORDER

The citations and proposed penalties which are the subject of Docket Numbers 93-1181, 93-1377, and 94-241 are AFFIRMED as final orders of the Occupational Safety and Health Review Commission.

SD

James H. Barkley
Judge, OSHRC

Dated:

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,
Complainant,

v.

OSHRC Docket Nos. 93-1181
93-1372
94-0241

TALASILA AND ITS SUCCESSORS,
Respondent.

ORDER

The Secretary's motion to amend is granted.

BY DIRECTION OF THE COMMISSION

SD

Ray H. Darling, Jr.
Executive Secretary

Date: August 5, 1996

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. Speer Boulevard
Room 250
Denver, Colorado 80204-3582

IN REFERENCE TO

Case	OSHRC
Name TALASILA, INC.	Docket No. 93-1181, 93-1372 and 94-0241

For the Secretary of Labor

Robin S. Horning, Esq.
Office of the Solicitor
U.S. Department of Labor
525 South Griffin Street - Suite 501
Dallas, TX 75202

For the Employer

Mr. R. Mikkilineni, P.E.
Talasila, Inc.
PO Box 699
Ingomar, PA 15127

NOTICE

Notice is hereby given that the hearing previously

scheduled to commence at 9:30 a.m., on Tuesday, May 14, 1996, will be held at the following location:

Room 463 (4th Floor)
Alliance Tower
8701 S. Gessner Avenue
Houston, Texas

This notice shall be posted and/or served by the respondent in accordance with Rule 7 of the Commission's Rules of Procedure.

SO ORDERED.

SD

James H. Barkley
Judge, OSHRC

Dated: May 7, 1996

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Oct. 9, 1996

Reply to the Attention of:

RUPA MIKKILINENI & M.R. MIKKILINENI
DBA TALASILA
P.O. BOX 699
INGOMAR PA 15127

INSPECTION NUMBER:	109453084
PENALTY:	$140000.00
INTEREST FEE (5%):	$ 1166.67
DELINQUENT FEE (6%):	$ 0.00
ADMINISTRATIVE COSTS:	$ 10.00
TOTAL AMOUNT DUE:	$141176.67

INSPECTION NUMBER:	109450544
PENALTY:	$ 6900.00
INTEREST FEE (5%):	$ 57.50
DELINQUENT FEE (6%):	$ 0.00
ADMINISTRATIVE COSTS:	$ 10.00
TOTAL AMOUNT DUE:	$ 6967.50

INSPECTION NUMBER:		109452607
PENALTY:	$	5400.00
INTEREST FEE (5%):	$	45.00
DELINQUENT FEE (6%):	$	0.00
ADMINISTRATIVE COSTS:	$	10.00
TOTAL AMOUNT DUE:	$	5455.00

Dear Employer:

I have been advised by our Area Office that you have failed to remit payment for penalties assessed under the Occupational Safety and Health Act and have not responded to earlier correspondence from our Area Office concerning this outstanding debt. Accordingly, the matter has been referred to this office for further action. We have reviewed your account and have determined that the total amount due, including the outstanding penalty as well as interest, delinquent fees and administrative costs assessed under the Debt Collection Act for failure to remit payment is as shown above. Your check or money order should clearly reference the Inspection Number shown above and should be made payable to: U.S. Department of Labor - OSHA. Payment should be sent to:

U.S. Department of Labor - OSHA
Delinquent Accounts Collection
Office of Management Data Systems
Post Office Box 2422
Washington, DC 20013

If payment in full is not received by this office within 30 days of the date of this letter, the account will be turned over to a private debt collection firm and you will be assessed additional fees associated with the use of the debt collection firm.

In the event that you do not remit payment within the next 30 days and also fail to do so following contact by the debt collection firm. the fact that you have failed to make the required payment will be disclosed to commercial credit reporting agencies and the Internal Revenue Service (IRS) will be notified of the amount of the outstanding debt. This amount may be collected through the IRS's Tax Refund Offset Program.

Should you have any questions regarding this matter you should write to the address shown above.

Sincerely,

SD

Michael V. Lee
Manager, Delinquent
Accounts and Collections

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 4, 1996

Mr. Ray H. Darling
Occupational Safety Health Administration
Suite 980
1120 20th Street NW
1 Lafayette Center
Washington, DC 20036

Mr. Thomas S. Williamson Jr.
United States Department of Labor
Office of the Solicitor
Room S-4004
200 Constitution Avenue NW
Washington, DC 20210

No. 96-60588 Talasila, Inc. v. Reich
Agency No. 93-1181
93-1372
94-0241

You are served with the following document(s) under FRAP 15:

(X) Petition for Review

( ) Application for Enforcement

( ) Cross Application for Enforcement

If this is a Petition for Review of a Federal Energy Regulatory Commission order, all parties are advised that the petitioner's docketing statement is due on _____. Additionally, if the record on review is filed, briefing is not to begin until we notify you. See Local Rule 15 for procedures governing Federal Energy Regulatory Commission cases.

See FRAP 16 and 17 as to the composition and time for the filing of the record.

( ) Application for a Summary Judgment Enforcing an Order of the National Labor Relations Board.

( ) Petition for Enforcement of an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Judgment.

This application and any response to be filed may be submitted to the Court within twenty (20) days from this date.

To enforce orders of the National Labor Relations Board, Local Rule 15.2 provides that the Board is considered the respondent for the purposes of briefing and oral argument, unless otherwise ordered by the Court.

All counsel desiring to appear in this case must sign and return the attached appearance form, naming each party you represent, within fifteen (15) days from this date as required by FRAP 12(b) and Local Rule 46. Failure to do so indicates that you do not desire to appear and your name will be removed from our docket in this case. Also, we cannot release official records on appeal unless an appearance has been entered.

(Y) Petitioner is advised to pay the Court of Appeals $100 docketing fee within (10) days from the date above; otherwise we will dismiss the appeal under Local Rule 42.3.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

SD

By: _____
T. J. Thorne, Deputy Clerk

Enclosure
cc w/encl: Mr M R Mikkilineni

DKT-4

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

Sep. 16 1996

Charles R. Fulbruge, III, Clerk
U.S. Court of Appeals for the Fifth Circuit
U.S. Court of Appeals Courthouse
Rm. 100, 600 Camp Street
New Orleans, LA 70130

Re: Talasila v. Secretary of Labor
No. 96-60588

Dear Mr. Fulbruge, III:

Enclosed for filing with the Court in the above-captioned matter are the entry of appearance forms for Ronald Gottlieb and Barbara Werthmann as counsel for respondent.

Sincerely,

SD

Ronald Gottlieb
Attorney
U.S. Department of Labor
Office of the Solicitor
Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 219-6824

Enclosure(s)

cc: M.R. Mikkilineni, PE

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

9/19/96

US Court of Appeals 5th Circuit
600 Camp St.
New Orleans, LA 70130
Atten: Nancy Dolly/T.J. Thorne
Ref: # 96-20471 - Mikkilineni v. City of Houston
96-60588 - Talalsila Inc. v. Secretary Reich

Honorable Court:
Thank you for letters dated 9/4/96 from Thorne and Dolly regarding the two related actions.

I sent a check for $100. towards the court fee.

I received 12 folders of records from Dolly a few days ago; and these folders will be returned along with my brief. Would you be kind to send me a copy of sample brief and appendices on a similar case if available.

I request that these two appeals, with parties and the subject matter being the same, be reviewed by one panel of Judges of this Honorable Court in the interest of Justice and economy of the proceedings.

Respectfully,

SD

M.R. Mikkilineni, PE

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 26, 1996

Ms. Andrea Chan
Office of the City Attorney
for the City of Houston
900 Bagby
4th Floor
Houston, TX 77002

Ms. Eleanor Ann Robinson-Gaither
US Attorney's Office
Suite 1500
910 Travis
PO Box 61129
Houston, TX 77208

Mr. Ronald J. Gottlieb
200 Constitution Ave, NW
Ste. S-4004
Washington, DC 20210

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552
No. 96-60588 Talasila v. Reich
Agency No. 93-1181

Regarding the case above, the following has been filed:

Motion filed by Appellant M R Mikkilineni to consolidate appeal 96-20471 with appeal 96-60588

This matter will be presented for ruling without oral argument. Any response must be filed by opposing counsel on or before 10/03/96. Counsel will be notified by mail after the court has ruled.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

SD

By: _____
Lisa Adams, Deputy Clerk

cc: M R Mikkilineni

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TALASILA AND ITS SUCCESSORS,
Petitioner

v. No. 96-60588

ROBERT B. REICH,
UNITED STATES SECRETARY OF LABOR,
Respondent

SECRETARY OF LABOR'S RESPONSE
TO MOTION TO CONSOLIDATE

Robert B. Reich, United States Secretary of Labor ("the Secretary"), Respondent[1] in the above-captioned case, hereby responds to Petitioner's motion to consolidate. The Secretary opposes consolidation for the following reasons.

---

[1] Although not named in the position for review, the Occupational Safety and Health Review Commission is a nominal respondent on appeal pursuant to Fed. R. App. P. 15(a). It can not actively participate in the judicial review proceedings of its orders, however. Oil, Chemical & Atomic Workers Int' Union v. OSHRC, 671 F.2d 643, 652 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982); Marshall v. OSHRC, 635 F.2d 544 (6th Cir. 1980). The Commission is an administrative adjudicative body independent of the U.S. Department of Labor.

1. The instant case arose as an enforcement action under the Occupational Safety and Health Act of 1970, 29 U.S.C. @ 651-678. The Act's purpose is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ." 29 U.S.C. @ 651. The Secretary enforces the Act by issuing citations to employers who violate the Act or standards promulgated under it. Id. at @ 658. The citations propose penalties where appropriate and specify dates by which the violations must be abated. Id. at @ 658, 666. The Act established the Occupational Safety and Health Review Commission ("Commission") as an independent adjudicative tribunal for employers who wish to contest the Secretary's citations. Id. at @ 659, 661; see Martin v. OSHRC, 499 U.S. 144 (1991).

2. In this proceeding, Petitioner seeks review of the Commission's order affirming the Secretary's citations alleging violations of that Act. The named respondent in that proceeding is Talasila and its successors. The violations occurred at a worksite Talasila maintained while performing a contract it had with the City of Houston.

3. Mikkilineni v. City of Houston, No. 96-20471, is a section 1983 action in which Mr. Mikkilineni alleges that the City of Houston and various individuals discriminated against him in violation of his civil rights and includes allegations of a conspiracy among the defendants. The appeal seeks review of the district court's judgment in favor of defendants.

4. The motion to consolidate seeks to have this proceeding consolidated with the appeal in City of Houston. The only basis for the request is Mr. Mikkilineni's statement that the "parties and the subject matter [are] the same." But this does not appear to be correct on either count. The appellees in the City of Houston are not the same as the respondent in this case.

5. Indeed, it is not even clear that the appellant in the City of Houston and the Petitioner here are the same entity. The appellant in City of Houston is Mr. Mikkilineni. The petition for review in this case is signed by M.R. Mikkilineni, apparently on behalf of himself. See Petition for Review 1 ("I hereby appeal the OSHRC final order for review by this Honorable Court . . ."). The administrative law decision for which Petitioner seeks review is captioned Talasila and its successors. The Court's letter transmitting the petition and Petitioner's motion to consolidate name Talasila, Inc. as the petitioner.[2] Perhaps Mr. Mikkilineni is seeking review as a successor Talasila.[3]

6. Finally, the subject matter of the two cases appears to be different. None of the issues Mr. Mikkilineni lists in the petition

[2] Talasila is a partnership, and Mr. Mikkilineni, apparently a non-lawyer, may not represent either Talasila, Inc. or Talasila. See Eagle Assocs. v. Bank of Montreal, 926 F.2d 1305 (2d Cir. 1991) (non-attorney cannot represent partnership in federal court); Southwest Exp. Co. v. ICC, 670 F.2d 53 (5th Cir. 1982) (dismissing case brought by corporation because not represented by counsel; quotes case explaining that same rule applies to partnerships). cf. Rowland v. California Men's County, 113 S. Ct. 716, 721 (1993) (relying in part on Eagle Assocs. and Southwest Exp. Co. and similar cases to construe "person" as not including artificial entities for purposes of statute allowing persons to proceed in forma pauperis). But see United States v. Reeves, 431 F.2d 1187 (9th Cir. 1970) (partner could file answer for partnership in foreclosure action), criticized in Rowland and Eagle Assocs.

[3] Until the identity of the Petitioner is clarified, the Secretary will use the term Petitioner. The Secretary does not, however, waive his right to have the petitioning party properly identified, or his right to seek dismissal of either Talasila, Inc., Talasila, or other entity.

for review appear related to a section 1983 action, Petition for Review at 3, and conversely, Mr. Mikkilineni has given no explanation of how the district court's judgment in the section 1983 action can affect Talasila's obligation to provide a safe workplace for its employees or the validity of the Commission's order.

WHEREFORE, the Secretary requests that the motion to consolidate be denied.

Respectfully submitted,

J. DAVITT McATEER
Acting Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

BARBARA WERTHMANN
Counsel for Appellate Litigation

SD

RONALD J. GOTTLIEB
Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room S-4004
Washington, D.C. 20210

(202) 219-6610

Date: October 2, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.R. Mikkilineni, General partner
of Talasila

Appellant

v. # 96-20471

City of Houston,
US Dept. of Labor et. al.

Appellees

and

Talasila

Petitioner

v. # 96-60588

Secretary Reich, US Dept. of Labor

Respondent

APPELLANT/PETITIONER'S REPLY TO CITY OF HOUSTON/SECRETARY OF LABOR MOTION/RESPONSE TO CONSOLIDATE TWO ACTIONS AT REVIEW

AND NOW, comes M.R. Mikkilineni, appellant/petitioner with a request to this honorable Court to place these two actions for review before the same panel of Judges preferably consolidated, and submit the facts/brief as follows:

1. Talasila, a Texas partnership association of which M.R. Mikkilineni was the general partner, went out of business and the entity does not exist; and therefore it is an extraordinary circumstance.

2. M.R. Mikkilineni as the general partner, is the real party of interest/real party of controversy for Talasila. The court in GOCHENOUR v. GEORGE and FRANCIS BALL, 35 F.Supp. 508, Cert. Denied, 313 US 566, said "it is clear that a cause of action is an asset or a property right of the individual to whom it belongs". The FRCP rule 17(a), in order to maintain the suit. the real party of interest must possess standing to sue. In the case of MESA OPER LTD v. LOUISIANA INTER STATE, 797 F.2d 238 (5th Cir.), the Court ruled that the exclusive power of the general partner to manage and control litigation conferred the status of real party to the controversy.

3. Further, the Secretary's and City of Houston's new found objection to M.R. Mikkilineni's representation of his own interests is MOOT since they failed to raise the issue during the trial court proceedings.

4. The action at #96-20471 is a result of complaint filed by M.R. Mikkilineni as a real party of interest/real party of controversy against City of Houston, Secretary of Labor and other individuals for certain specific causes of action, based on the facts of the subject matter related to a contract between Talasila and City of Houston.

5. The action at #96-60588 is a result of Secretary of Labor filing complaints against Talasila, (Talasila Inc. in the original filing was replaced with Talasila) of which M.R. Mikkilineni was the general partner, for certain specific causes of action, based on the same facts of the subject matter related to the same contract between Talasila and City of Houston referred to above.

6. All the facts and the actors involved here are common to these two actions, even though the causes of action are not the same. In the interest of Judicial economy and fairness to all parties the Reviewing Court can decide on each cause of action separately after considering all the facts on record in both these actions. If these two actions are not consolidated, how-else can the Court determine the TRUTH?

Therefore, M.R. Mikkilineni requests this Honorable Court to strike Secretary's and Houston's motions to dismiss, and place both these actions before the same Reviewing Panel of Judges, preferably consolidated, in the interest of Judicial economy and fairness to all parties.

Respectfully submitted,

SD

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

I certify that a true and correct copy is sent to the following by US mail on 10/8/1996.

1. Ronald Gottlieb - US DOL, Rm 4004, 200 Constitution Ave, NW, Washington, DC 20210

2. Andrea Chan - Assist. City Attorney, PO Box 1562 Houston, TX 77251

M.R. Mikkilineni

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 6, 1996

Mr. M. R. Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-60588 Talasila, Inc. v. Reich
Agency No. 93-1181
93-1372
94-0241

We have filed the certified list. PETITIONER'S BRIEF AND EXCERPTS ARE DUE WITHIN 40 DAYS FROM THE DATE ABOVE. See Local Rule 30.1 for the contents of the Record Excerpts which are to filed instead of an appendix. A briefing checklist will be sent upon request. Intervenor's time is governed by Local Rule 31.2. Local Rule 42.3.2 allows the Clerk to dismiss appeals without notice if the brief is not timely filed.

The caption for this appeal is attached. Please use this caption on any briefs to be filed with this court.

Since this case is proceeding on a certified list of documents instead of the record, please note the requirements of Local Rule 30.2. Petitioner is to obtain a copy of the portions of the record relied upon by the parties in their briefs, and file them within 21 days from the date of filing of respondent's brief, with suitable covers, numbering and indexing.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

SD

By: _____
Monica Washington, Deputy Clerk

Enclosure
cc w/encl: Mr. Ronald J. Gottlieb

Case No. 96-60588

TALASILA, INC.
Petitioner

v.

ROBERT B. REICH, Secretary of Labor
Respondent

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp St.
New Orleans, LA 70130

12/23/1996
by Exp. Mail

Atten: Monica Washington

Ref: # 96-60588 Talasila Inc. v. Robert Reich, Secretary
93-1181, 93-1372, 94-0241 OSHRC

Honorable Court:

Petitioner's brief in this action was to be filed by 12/16/1996 and the petitioner has motioned the Court on 12/19/96 to allow out of time filing with excess pages.

Pleased to file 7 copies of the brief and 4 copies of record excerpts by Exp mail today, 12/23/96.

Petitioner requests this honorable Court to excuse the delay of one week and permit to file this brief, because it took more time than anticipated in finalizing two separate briefs on related matter which are for review by this Court at this time.

Respectfully,
SD

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127

cc: Secretary of DOL

United States Court of Appeals
Fifth Circuit
Office of the Clerk

January 6, 1997

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 96-60588 Talasila, Inc. v. Reich
USDC No. 94-0241
93-1372
93-1181

The unopposed motion to file brief and record excerpts out of time has been granted in the appeal referenced above.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

SD

By: _____
Monica Washington, Deputy Clerk

Mr. M. R/ Mikkilineni
Mr. Ronald J. Gottlieb

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60588

TALASILA, INC.
Petitioner
v.
CYNTHIA A. METZLER, ACTING SECRETARY OF LABOR
Respondent

MOTION TO AMEND CAPTION BY
SUBSTITUTING PARTIES

COMES NOW, Talasila, Inc., petitioner above-named, by its lawyer, Michael L. Rosenfield, pursuant to F.R. App. P. 27, and submits the following in support of its Motion to Amend Caption by Substituting Parties:

1. M.R. Mikkilineni was a partner in the partnership known as "Talasila" which entered into a construction contract ("the contract") with the City of Houston, Texas in June 1992.

2. Mr. Mikkilineni was also an incorporator of Talasila, Inc. which was formed prior to the formation of the partnership. Talasila, Inc. was not related to Talasila and had no part in the contract between Talasila and the City of Houston.

3. During the performance of the contract, Talasila was cited by the Secretary of Labor for various OSHA violations.

4. The proceeding below, before the Occupational Safety and Health Review Commission ("the Commission"), involved only Talasila although Talasila, Inc. was named as a party.

5. The final order of the Commission binds only Talasila and its successors.

6. Talasila is the party which has the standing to prosecute the instant appeal.

7. Because Talasila, Inc. was named in this appeal, and because Talasila, Inc. is not a successor to Talasila, Talasila should be substituted for Talasila, Inc. as a party in this appeal and in the caption.

WHEREFORE, Petitioner respectfully requests this court to substitute Talasila for Talasila, Inc. in the caption in this appeal and as the Petitioner.

Respectfully submitted,

SD

Dated: March 27, 1997

Michael L. Rosenfield
Pa. I.D. No. 16480
1808 Law & Finance Bldg.
Pittsburgh, PA 15219
412/281-6800

Lawyer for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60588

TALASILA, INC.

Petitioner

v.

CYNTHIA A. METZLER, ACTING SECRETARY OF LABOR

Respondent

AFFIDAVIT OF M.R. MIKKILINENI IN SUPPORT OF
PETITIONER'S MOTION TO AMEND CAPTION

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned notary public, personally appeared M.R. Mikkilineni, who, being duly sworn according to law, stated the following to be true to the best of his knowledge, information and belief:

1. He and his daughter, Rupa Mikkilineni, entered into a partnership under the name "Talasila" in June 1992 which was duly registered as a partnership in Harris County, Texas.

2. In May 1992, he was an incorporator in a corporation known as "Talasila, Inc." which was duly incorporated under the laws of the State of Texas.

3. In June 1992 Talasila entered into a construction contract with the City of Houston, Texas.

4. Talasila, Inc. was not a party to the aforenoted contract.

5. The Secretary of Labor cited Talasila, Inc. for OSHA violations, and Talasila, Inc. appealed the citations and the $150,000 penalty for those violations to the Occupational Safety and Health Review Commission ("the Commission").

6. Later, the Secretary moved the Commission to substitute Talasila for Talasila, Inc. which the Commission granted.

7. After the Commission entered its final order binding Talasila, the Secretary moved the Commission to substitute "Talasila and its successors" for Talasila which was granted.

8. The Commission entered a final order which binds Talasila and its successors but does not mention Talasila, Inc.

9. He filed a pro se appeal in the above-captioned matter but did not name the Petitioner.

10. This Court subsequently named "Talasila, Inc." as the Petitioner in this action. (See footnote 2 in Secretary of Labor's Motion to Dismiss or, in the Alternative, for a Declaration that Talasila, Inc. is a "Successor" to Talasila.)

11. The proper party to this action is Talasila which remains a viable entity.

SD

M.R. Mikkilineni

Sworn to and subscribed
before me this 27th day
of March 1997 by M.R.
Mikkilineni

SD

Notary Public

Notarial Seal
Kelly L. Nixdorf, Notary Public
Manor Boro, Westmoreland County
My Commission Expires Aug. 19, 2000

CERTIFICATE OF SERVICE

I hereby certify that I mailed by first class mail a true and correct copy of the foregoing Motion to Amend Caption by Substituting Parties on the 27th day of March 1997 to:

J. Davitt McAteer
Acting Solicitor of Labor
Joseph M. Woodward
Assoc. Sol. for Occ.
Safety & Health
Bruce Justh
Assistant Counsel for
Appellate Litigation
Ronald Gottlieb
U.S. Department of Labor
Room S-4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

SD

Michael L. Rosenfield

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington, DC 20210

February 5, 1997

Charles R. Fulbruge, III, Clerk
U.S. Court of Appeals for the Fifth Circuit
U.S. Court of Appeals Courthouse
Rm. 100, 600 Camp Street
New Orleans, LA 70130

Re: Talasila, Inc. v. Secretary of Labor,
No. 96-60588

Dear Mr. Fulbruge, III:

Enclosed for filing with the Court in the above-captioned matter are the original and six copies of the Brief for the Secretary of Labor. Petitioner has been served as indicated in the certificate of service.

Sincerely,
SD
Ronald Gottlieb
Attorney
U.S. Department of Labor
Office of the Solicitor
Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 219-6610

Enclosure(s) cc: M.R. Mikkilineni, PE

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp St.
New Orleans, LA 70130

2/25/1997
by Exp. Mail

Atten: Monica Washington

Ref: # 96-60588 Talasila Inc. v. Robert Reich, Secretary
93-1181, 93-1372, 94-0241 OSHRC

Honorable Court:

The Secretary's brief dated 2/5/97 is received to me on 2/7/97. I am pleased to file my reply brief and appendix of record used as reference in the briefs (mine and the Secretary); seven copies of reply brief and four copies of appendix are attached. Please advise if I made any mistakes in this filing and I will be glad to correct.

I received a form for appearance of counsel today in the mail. I will give it to my new attorney and request him to enter appearance in this matter. I went ahead with this filing because of the 21 day limitation after Secretary filed brief.

Respectfully;

SD

M.R. Mikkilineni, PE

cc: Ronald Gottlieb, Esq.